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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 329

COMPAGNIE GENERALE TRANSATLANTIQUE,
PETITIONER

v.

GEORGE V. TAWES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

No opinion was rendered by the District Court. The opinion of the Circuit Court of Appeals for the Fifth Circuit (R. 93–98) is reported in 111 F. (2d) 92.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 12, 1940 (R. 98). A petition for rehearing (R. 99–102) was denied on July 8, 1940 (R. 103). The petition for a writ of cer-

tiorari was filed August 13, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

A steamship, while passing through the Panama Canal, went aground allegedly as a consequence of the negligence of its compulsory pilot. This is an action by the vessel owner against the pilot.

The questions are:

1. Whether the District Court correctly charged the jury as to the degree of care which the pilot should have exercised.
2. Whether the District Court correctly charged the jury as to the burden of proof.
3. Whether there was any evidence to support the verdict of the jury.

STATEMENT

Petitioner commenced this action in the United States District Court for the District of the Canal Zone, Division of Balboa, against the respondent Tawes, a compulsory pilot, to recover damages for injuries to the steamer *Wisconsin* incurred when it stranded while passing through the Panama Canal.[1]

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[1] Originally, suit had been brought against the Governor of the Panama Canal, the Panama Canal, and Tawes. The complaint was dismissed as to the Governor of the Panama Canal and the Panama Canal on the question of jurisdiction;

In its amended complaint (R. 2–6), petitioner alleged, *inter alia,* that on February 17, 1935, the steamer *Wisconsin,* owned and operated by it, was in the harbor of Cristobal, awaiting transit through the Panama Canal; that a vessel was forbidden to transit the canal without a Panama Canal pilot aboard; that respondent, as such pilot, boarded the steamer and took charge of the navigation through the canal; that thereafter the master of the vessel was prohibited from issuing any orders concerning the operation or navigation of the ship, unless directed or advised to do so by the compulsory pilot; and that "said pilot carelessly, negligently and unskillfully operated, managed and navigated said vessel *Wisconsin* as to cause it to run aground on the bank of the Canal and stick on said bank, thereby causing the hereinafter mentioned damages to said vessel and the plaintiff herein" (R. 4). The complaint specified five distinct acts of negligence on the part of respondent (R. 4–5) and concluded with a prayer for damages (R. 5–6). The answer of respondent (R. 6–9) admitted that the *Wisconsin* was in Cristobal on the date named, but denied all other allegations in the complaint.

The case was submitted to a jury for determina-

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the Circuit Court of Appeals for the Fifth Circuit affirmed the dismissal, *Compagnie Generale Transatlantique* v. *The Governor of the Panama Canal and the Panama Canal,* 90 F. (2d) 225. This Court denied certiorari, 302 U. S. 720, whereupon the case was sent to the District Court for trial, with Tawes as sole defendant.

tion on all the evidence (R. 35–81) under instructions by the district court (R. 10–20). The jury brought in a verdict for the respondent (R. 20), and judgment in conformity with the verdict was entered (R. 22). A motion by respondent for a new trial (R. 23–25) was dismissed (R. 26).

Petitioner's only pertinent claims of error, during the course of the trial, were two general objections, made without pointing out any specific defects, to Instructions 3 and 5 (R. 22, 24, 82).[2] It

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[2] Instruction 3 reads (R. 15–16):

"The Court instructs the jury that although it was the duty of defendant George V. Tawes, as set forth in Instruction No. '1,' when overtaken by thick or foggy weather to immediately take or direct every precaution necessary for safety and anchor or moor the vessel at the first available place, yet, if you further believe from the evidence that the defendant, George V. Tawes, while exercising ordinary care and skill and all of the duties required of him by Instruction No. '1' on the steamship *Wisconsin* it was suddenly overtaken by fog so thick and dence that his visibility of navigating aids was obscured and that the defendant by the exercise of ordinary care and skill could not have anticipated this situation and condition before it happened, and if you further believe that the defendant, George V. Tawes, when confronted with this situation and condition then used ordinary care and skill for the safety of the vessel and to prevent grounding of same, but by the use of ordinary care and skill he was unable to do so and the vessel went aground, then the law is for the defendant and the jury should so find."

Instruction 5 reads (R. 17):

"The burden of proof in this case is upon the plaintiff, and unless you are reasonably satisfied by a preponderance of the evidence that the plaintiff is entitled to recover, you should find for the defendant. If, after considering all the evi-

made no motion for a directed verdict or for judgment notwithstanding the verdict.

On appeal, the Circuit Court of Appeals for the Fifth Circuit affirmed the judgment entered by the District Court (R. 93–98).

ARGUMENT

1. Petitioner's contention (Pet. 4–5) that Instruction 3, among the several dealing with the standard of care, was so erroneous and misleading as to vitiate the verdict of the jury is without substance. The instructions as a whole (Nos. 1, 3, and 4), while stating that the pilot was required to exercise "ordinary care," expressly declared that respondent was required "to immediately direct and take every precaution necessary for safety" when overtaken by fog (R. 14, 15) and defined "ordinary care" to mean the care which ordinarily prudent pilots would exercise in the circumstances of this case (R. 16). No decision imposes a higher standard. Compare *The City of Lowell,* 152 Fed. 593, 594 (C. C. A. 2d); *Wilson* v. *Pilots' Assn.,* 57 Fed. 227, 231 (E. D. S. C.); *Mason* v. *Ervine,* 27 Fed. 459 (C. C. E. D. La.). The language of Instruction 3 itself, as the court below observed (R. 97), is neither inconsistent nor calculated to

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dence, your minds are left in a state of reasonable uncertainty as to whether or not plaintiff is entitled to recover, your verdict should be for the defendant."

confuse the jury;[3] the instructions viewed as a whole are plainly correct.

2. The contention (Pet. 5–6) that Instruction 5 required the petitioner to prove his case beyond a reasonable doubt is equally lacking in merit. The first sentence of Instruction 5 adequately stated the "preponderance of the evidence" rule, and Instruction 6 (R. 17–18) dealt at length with the meaning of "preponderance of the evidence." The instruction as a whole, as the court below held (R. 97), could not have misled the jury. See *Danzansky* v. *Zimbolist,* 105 F. (2d) 457 (App. D. C.).

3. A careful review of the evidence persuaded the court below to conclude that the "jury could reasonably approve his [respondent's] conduct as not negligent" (R. 95–96). The soundness of its conclusion is evident on the face of the record.[4]

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[3] The petitioner further contends that Instruction 3 was erroneous in that it (a) submitted to the jury the defense of inevitable accident, which was not pleaded, and (b) was based on the assumption that respondent could not have anticipated the fog, which assumption is not supported by the evidence (Pet. 12–13). The respondent's answer denying negligence, however, was sufficient to permit the defense (R. 97), and there was evidence that visibilty was shut out in five seconds (R. 69).

[4] The evidence to support the conclusion is, in short, as follows: There was evidence from which the jury could have concluded that the three fogs, encountered prior to the accident, were discernible in sufficient time to enable the pilot to stop the vessel without damage (R. 64–65, 73) but that the fog encountered immediately preceding the accident came on so suddenly that respondent could not have an-

4. Moreover, in any event, there are sufficient independent grounds to support the verdict and judgment. In the first place, petitioner's objections to Instructions 3 and 5 were too general to provide the District Court with an opportunity to correct the alleged errors. *Guerini Stone Co.* v. *Carlin Construction Co.*, 248 U. S. 334, 348; *United States* v. *United States Fidelity Co.*, 236 U. S. 512, 529; *State Life Ins. Co.* v. *Sullivan*, 58 F. (2d) 741, 744 (C. C. A. 9th). Secondly, the sufficiency of the evidence to support the verdict was not questioned either by a motion for a directed verdict or for judgment notwithstanding the verdict. *Hansen* v. *Boyd*, 161 U. S. 397, 402; *Hartford Life Annuity Insurance Co.* v. *Unsell*, 144 U. S. 439, 450–451; *Baten* v. *Kirby Lumber Corp.*, 103 F. (2d) 272, 273 (C. C. A. 5th); *Ellerd* v. *Griffith*, 29 F. (2d) 402, 403 (C. C. A. 5th). In these circumstances, as the cited cases hold, the objections cannot be pressed upon appeal.

5. Finally, no question of either substantial or general importance is involved. The rules concerning the burden of proof and a pilot's duty of care in a fog are not in dispute. No conflict is urged in the petition. The only issues are whether the particular instructions, under the circum-

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chored the ship without endangering the vessel (R. 68, 69, 73). There was also evidence that, immediately prior to the accident, the vessel's speed was slowed as a precautionary measure and that, after the fog came on, the pilot exercised every precaution (R. 66, 70, 72, 73, 75–76).

stances of this case, sufficiently comply with accepted standards and whether there is any evidence to sustain the judgment.

CONCLUSION

For the foregoing reasons, we respectfully submit, the petition for a writ of certiorari should be denied.

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